

CS

PACE ENVIRONMENTAL LITIGATION CLINIC,
INC.

ELISABETH HAUB SCHOOL OF LAW
78 NORTH BROADWAY
WHITE PLAINS, NEW YORK 10603
PHONE: 914.422.4343
FAX: 914.422.4437

SUPERVISING ATTORNEYS
KARL S. COPLAN
TODD D. OMMEN

ADMINISTRATOR
JENNIFER RUHLE

November 1, 2017

Via Certified Mail, Return Receipt Requested

Cargill, Inc.
Attn: Environmental Manager or Supervisor
101 Normanskill Street,
Albany, New York 12202

Re: Notice of Violation and Intent to File Suit under the Clean Water Act

Dear Sir or Madam,

We write on behalf of our client, Riverkeeper, Inc.,¹ to notify you of our intent to file suit against Cargill, Inc., pursuant to Section 505 of the federal Clean Water Act ("CWA").²

We intend to file suit, as an organization and on behalf of adversely affected members, in the United States District Court for the Northern District of New York seeking appropriate equitable relief, civil penalties, attorneys' fees and other relief no earlier than 60 days from the postmark date of this letter.³

We intend to take legal action because Cargill, Inc. is discharging polluted stormwater

¹ Riverkeeper, Inc. is a not-for-profit environmental organization existing under the laws of the state of New York, headquartered in Ossining, New York. Riverkeeper's mission includes safeguarding the environmental, recreational and commercial integrity of the Hudson River and its ecosystem, as well as the watersheds that provide New York City with its drinking water. Riverkeeper was originally founded by the Hudson River Fisherman's Association, a group of fishermen concerned about the ecological state of the Hudson River, and the effect of its polluted and degraded condition on fish. Riverkeeper achieves its mission through public education, advocacy for sound public policies and participation in legal and administrative forums. Riverkeeper has more than 3,000 members, many of whom reside near to, use and enjoy the Hudson River and its tributaries; waters that are polluted by industrial stormwater runoff.

² 33 U.S.C. § 1365. We refer to statutory provisions by their section in the Clean Water Act and provide the parallel citation to the United States Code only on first reference.

³ See 40 C.F.R. § 135.2(a)(3)(c) (notice of intent to file suit is deemed to have been served on the postmark date).

from Cargill Inc.'s facility at 101 Normanskill Street, Albany, New York 12202 ("the Facility") to the waters of the United States without a permit in violation of sections 301(a) and 402(p)(2)(B) of the Clean Water Act.⁴ Further, Cargill, Inc., has not applied for coverage under, nor complied with the conditions of, an individual State Pollutant Discharge Elimination System ("SPDES") permit or the General Permit for the Discharge of Stormwater Associated with Industrial Activity ("General Permit")⁵ issued by the New York State Department of Environmental Conservation ("DEC"), in violation of Sections 402(p) and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

I.

BACKGROUND

With every rainfall event, hundreds of millions of gallons of polluted rainwater pour into the Hudson River and other receiving waters. Agencies and water quality specialists agree that stormwater⁶ pollution accounts for more than half of the total pollution entering the marine environment each year.

DEC has designated more than 7,000 river miles, 319,000 acres of larger waterbodies, 940 square miles of bays and estuaries, and 592 miles of Great Lakes shoreline in New York State as "impaired," or not meeting water quality standards, and unable to support beneficial uses such as fish habitat and water contact recreation.⁷ For the overwhelming majority of water bodies listed as impaired, stormwater runoff is cited as a primary source of the pollutants causing the impairment. Contaminated stormwater discharges can and must be controlled in order to improve the quality and health of these waterbodies.

Stormwater discharges flow from the Facility directly into the Hudson River. DEC has classified the portion of the Hudson River running through Albany, New York, as a class C water.⁸ Under New York's Water Quality Standards, a waterbody that is designated as class C is meant to be suitable for fish, shellfish, and wildlife propagation and survival.⁹ The New York State Water Quality Standards set numeric and narrative criteria for different water pollution parameters including dissolved oxygen, oil and grease,

⁴ 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).

⁵ New York State Department of Environmental Conservation, SPDES Multi-Sector General Permit for Stormwater Discharges Associated With Industrial Activity, Permit No. GP-0-12-001, (hereinafter "General Permit"), available at <http://www.dec.ny.gov/chemical/9009.html> (last visited June 22, 2017). This General Permit replaces earlier general permits for the discharge of stormwater associated with industrial activity. It became effective on October 1, 2012, and will expire on September 30, 2017.

⁶ Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt. See 40 C.F.R. § 122.26(b)(13).

⁷ See EPA, Watershed Assessment, Tracking and Environmental Results, New York Assessment Data for 2012, http://ofmpub.epa.gov/waters10/attains_state.report_control?p_state=NY&p_cycle=2012&p_report_type=A (last visited Oct. 14, 2014).

⁸ See 6 N.Y.C.R.R. § 858.4

⁹ See 6 N.Y.C.R.R. § 701.8

suspended and settleable solids, bacteria (pathogens), pH, temperature, nutrients, and others. A waterbody must meet these numeric and narrative criteria in order to support its designated uses.¹⁰

II.

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED AND ACTIVITIES ALLEGED TO BE VIOLATIONS

A. Cargill, Inc., Is Discharging Stormwater Associated with Industrial Activity to Waters of the United States without a Permit.

The CWA prohibits the discharge of pollutants to the waters of the United States except in accordance with a valid SPDES permit.¹¹ Cargill Inc.'s industrial activity at the Facility has caused and continues to cause a "discharge of pollutants" within the meaning of Section 502(12) of the CWA¹² and a "stormwater discharge associated with industrial activity" within the meaning of 40 C.F.R. § 122.26(b)(14) from the Facility on at least each and every day that there has been a rain event of more than 0.1 inches.¹³ This occurs frequently. In 2016 alone, there were 64 days on which over 0.1 inches of rain fell on Albany.¹⁴

Cargill Inc.'s activities at the Facility include, but are not limited to the production and storage of food products. In carrying out these activities at the Facility, Cargill, Inc., stores and handles materials in a manner that exposes them to precipitation and snowmelt. In particular, raw material piles, storage of materials in above ground tanks, machinery, and trucks that have completed their deliveries can release pollutants onto the Facility property. These activities can release dust, total suspended solids, total dissolved solids, pH, and other pollutants into stormwater and directly into the Hudson River.

Because Cargill, Inc., fails to adequately shelter and otherwise contain these materials to prevent their release to the environment, precipitation falls on and flows over exposed materials, fluids, and particulates. Polluted stormwater discharges flow into the Hudson River. The Hudson River is a "water of the United States," as defined in 40 C.F.R. § 122.2 and, therefore, part of the "navigable waters" as defined in Section 502(7) of the CWA. Cargill, Inc., does not have a SPDES permit for these discharges of pollutants. Thus, Cargill, Inc., is discharging polluted industrial stormwater into navigable waters of

¹⁰ See 6 N.Y.C.R.R. §§ 702, 703.

¹¹ See CWA §§ 301(a), 402.

¹² 33 U.S.C. § 1362(12).

¹³ EPA has determined that precipitation greater than 0.1 inches in a 24-hour period constitutes a measurable precipitation event for the purposes of evaluating stormwater runoff associated with industrial activity. See, e.g., 40 C.F.R. § 122.26(c)(i)(E)(6) (using 0.1 inches as the distinguishing threshold of a storm event).

¹⁴ See National Weather Service Albany, NY, *Climatological Report (Annual)*, NAT'L WEATHER SERV., <https://forecast.weather.gov/product.php?site=NWS&product=CLA&issuedby=ALB> (last visited June 22, 2017).

the United States without the permit required under Sections 301 and 402 of the CWA.

B. Cargill, Inc., Is Violating the Clean Water Act by Failing to Apply for SPDES Permit Coverage.

Cargill, Inc., is engaged in the business of food and kindred products processing and is therefore an industrial discharger with a primary Standard Industrial Classification (“SIC”) Code of 2041, which is an industrial activity included in Sector U of the General Permit. Additionally, based on the appearance of the property, Cargill Inc.’s activities may also fall under an additional sector of the General Permit, triggering further requirements related to those activities.

Pursuant to Section 402(a) and (p) of the CWA and regulations promulgated by EPA pursuant to the CWA, Cargill, Inc., must apply for coverage under the General Permit or an individual SPDES permit for Cargill, Inc.’s discharge of polluted stormwater. In addition, Cargill, Inc., must apply for an individual SPDES permit if the Facility is discharging process wastewater, or has any other non-stormwater discharge containing pollutants that is not authorized by the General Permit. By failing to apply for coverage under the General Permit or an individual permit, Cargill, Inc., is violating CWA Sections 301(a) and 402(a) and (p) and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).¹⁵

To be eligible to discharge under the General Permit, Cargill, Inc., must submit to DEC a registration form called a “Notice of Intent.”¹⁶ Notice of Intent forms are available online from DEC.¹⁷ To register, Cargill, Inc., is required, among other things, to list all stormwater discharges, including descriptions of the industrial activities taking place in the drainage area of each discharge and the acreage of industrial activity exposed to stormwater, the separate storm sewer system or immediate surface water body or wetland to which site runoff discharges, and the name of the watershed and nearest waterbody to which the site ultimately discharges and information about whether the receiving waters are impaired.¹⁸ Cargill, Inc., has failed to prepare and file a Notice of Intent or an

¹⁵ Sections 301(a) and 402(a) and (p) make it unlawful for Cargill, Inc., to discharge stormwater associated with industrial activity without obtaining a NPDES permit. 40 C.F.R. sections 122.26(c)(1) and (e)(1) require Cargill, Inc., to apply for a NPDES permit that covers Cargill Inc.’s discharge of stormwater associated with industrial activity.

¹⁶ See General Permit, Part I.E.3. In notifying Cargill, Inc., that the Clean Water Act requires coverage under and compliance with a valid NPDES permit in order to lawfully discharge, and that submission of a Notice of Intent to DEC is required in order to obtain coverage under the General Permit, we do not concede that all of the activities conducted at the Facility are necessarily eligible for coverage under that permit. For example, if the Facility is discharging process wastewater, such as wash water, or has any other polluted non-stormwater discharge that is not authorized by the General Permit, then an individual NPDES permit is required and the failure to obtain and comply with an individual NPDES permit for such discharges also violates CWA §§ 301(a) and 402(p). The conditions for eligibility to discharge under the General Permit are provided in Part I.C. of the permit.

¹⁷ See *Notice of Intent for Stormwater Discharges Associated with Industrial Activity under the State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit GP-0-12-001 (MSGP)*, New York State Department of Environmental Conservation, Division of Water, Bureau of Water Permits.

¹⁸ See *id.*

application for an individual permit.¹⁹

C. Cargill, Inc is Violating the Clean Water Act by Failing to Comply with the General Permit

As a discharger of stormwater associated with industrial activity, Cargill, Inc must comply at all times with the requirements of the General Permit (or an individual permit).²⁰ By discharging stormwater associated with industrial activity without complying with the General Permit, Cargill, Inc is violating CWA Sections 301(a) and 402(a) and (p).²¹ The main General Permit requirements that Cargill, Inc has failed and continues to fail to meet are explained further below.

1. Cargill, Inc has not developed and implemented a Stormwater Pollution Prevention Plan.

Before submitting a Notice of Intent, Cargill, Inc must prepare, make available, and implement a Stormwater Pollution Prevention Plan ("SWPPP") in accordance with schedules established in the General Permit.²² The SWPPP must identify potential sources of pollution that may affect the quality of stormwater discharges associated with industrial activity. Further, the SWPPP must describe and ensure the implementation of practices that minimize the discharge of pollutants in these discharges and that assure compliance with the other terms and conditions of the General Permit, including achievement of effluent limitations.²³

Among other things, the SWPPP must include: a general site description, a general location map identifying the location of the facility and all receiving waters to which stormwater discharges, information related to a company stormwater pollution prevention team, a summary of potential pollutant sources, a description of control measures and best management practices, and schedules and procedures for implementation of control measures, monitoring and inspections.²⁴

Cargill, Inc., has neither developed nor implemented a legally compliant SWPPP, as required by Part III of the General Permit.²⁵

¹⁹ A thorough search of EPA's Enforcement & Compliance History Online ("ECHO") database and DEC's records reveals that no Notice of Intent has been submitted for the Facility.

²⁰ This section discusses the compliance requirements of the General Permit. If Cargill, Inc., elects to seek coverage under an individual NPDES permit instead, the conditions of that individual permit will be at least as strict as those of the General Permit, thus Cargill, Inc., will still be required to comply with all of the following.

²¹ Sections 301(a) and 402(a) and (p) make it unlawful for Cargill, Inc to discharge stormwater associated with industrial activity without first complying with all of the conditions established in a NPDES permit.

²² See General Permit Part III.B.

²³ See General Permit Part III.A.

²⁴ See General Permit Part III.C.

²⁵ We believe no SWPPP exists. If a SWPPP exists, then it is either facially inadequate or has not been fully and adequately implemented.

- Total Suspended Solids;
- Total Nitrogen; and
- Total Phosphorus.⁴⁸

We are not necessarily aware of all industrial activities taking place at the Facility. To the extent that industrial activities other than the above are carried out at the Facility, other sampling may be required as well.⁴⁹ This notice provides Cargill, Inc., with sufficient information to identify the standards and limitations that apply to all categories of industrial activity.

Cargill, Inc., has failed to conduct the required annual and other routine inspections, monitoring, and testing, as required by, at least, Parts III, IV, and VIII of the General Permit. Cargill, Inc., also has failed to retain records and submit monitoring reports to DEC, as required by, at least, Parts IV and VIII of the General Permit.

4. Cargill, Inc., has failed to comply with additional requirements located in Part VIII of the General Permit.

As noted above, the General Permit contains various requirements specific to Sector U. These requirements, some of which are referenced above, are collected in Part VIII of the General Permit. They include:

- A requirement to that the site map identify the locations of the following activities if they are exposed to precipitation/surface runoff:
 - Vents/stacks from cooking, drying, and similar operations;
 - Dry product vacuum transfer lines;
 - Animal holding pens;
 - Spoiled product; and
 - Broken product container storage areas.
- A requirement that the SWPPP describe application and storage of pest control chemicals (e.g., rodenticides, insecticides, fungicides, etc.) used on plant grounds.
- A requirement that, at a minimum, the following areas, where the potential for exposure to stormwater exists, be inspected:
 - Loading and unloading areas for all significant materials;
 - Storage areas, including associated containment areas;

⁴⁸ See General Permit, Part VIII, Sector U.

⁴⁹ See General Permit, Part VIII.

- Waste management units;
 - Vents and stacks emanating from industrial activities;
 - Spoiled product and broken product container holding areas;
 - Animal holding pens;
 - Staging areas; and
 - Air pollution control equipment.
- A requirement that the employee training program address pest control.

5. Cargill, Inc., is clearly violating the Clean Water Act.

In sum, Cargill, Inc.'s discharge of stormwater associated with industrial activities without a permit, Cargill, Inc.'s failure to apply for permit coverage, and Cargill, Inc.'s failure to comply with the above-listed conditions of the General Permit (or an individual SPDES permit) constitute violations of the General Permit and of Sections 301(a) and 402(p) of the Clean Water Act.

III.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

Cargill, Inc., is the person, as defined by Section 502(5) of the CWA, responsible for the violations alleged in this Notice. Cargill, Inc., has operational control over the day-to-day industrial activities at this Facility. Therefore, Cargill, Inc., is responsible for managing stormwater at the Facility in compliance with the CWA. We hereby put Cargill, Inc., on notice that if we subsequently identify additional persons as also being responsible for the violations set forth above, we intend to include those persons in this action.

IV.

LOCATION OF THE ALLEGED VIOLATIONS

The violations alleged in this Notice have occurred and continue to occur at the Facility located at 101 Normanskill Street, Albany, New York 12202. During precipitation events, stormwater polluted by the facility rushes off the property and discharges directly into the Hudson untreated. The failure to develop and implement pollution prevention plans and take the other required measures are violations occurring at the Facility in general and in the inadequate documents themselves.⁵⁰

⁵⁰ The federal courts have held that a reasonably specific indication of the area where violations occurred, such as the name of the facility, is sufficient and that more precise locations need not be included in the

V.

DATES OF THE VIOLATION

Every day upon which Cargill, Inc., has failed to apply for permit coverage since Cargill, Inc., first commenced operations at the Facility and discharged polluted stormwater is a separate violation of Section 301(a) of the CWA and EPA's regulations implementing the CWA.⁵¹

Additionally, Cargill, Inc., has discharged pollution without a permit in violation of Section 301(a) of the CWA on every day since Cargill, Inc., commenced operations at the Facility on which there has been a measurable precipitation event or discharge of previously accumulated precipitation (i.e., snowmelt) over 0.1 inches.

Finally, if Cargill, Inc., seeks permit coverage after receiving this letter but fails to fully comply with the requirements of the General Permit (or an individual permit), each day upon which Cargill, Inc., claims coverage under a SPDES permit but fails to comply with that permit will constitute a separate day of violation with respect to each unmet condition of that permit.

Cargill, Inc., is liable for the above-described violations occurring prior to the date of this letter, and for every day after the date of this letter that these violations continue. In addition to the violations set forth above, this Notice covers all violations of the CWA evidenced by information that becomes available to us after the date of this Notice of Intent to File Suit.⁵² These violations are ongoing, and barring full compliance with the permitting requirements of the Clean Water Act, these violations will continue.

VI.

RELIEF REQUESTED

First, we will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to Sections 505(a) and (d) and such other relief as

notice. See, e.g., *Natural Resources Defense Council v. Southwest Marine, Inc.*, 945 F. Supp. 1330, 1333 (S.D. Cal. 1996), aff'd 236 F.3d 985, 996 (9th Cir. 2000); *City of New York v. Anglebrook Ltd. Partnership*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995); *United Anglers v. Kaiser Sand & Gravel Co.*, No. C 95-2066 CW, 1995 U.S. Dist. LEXIS 22449 at *4 (N.D. Cal. Sept. 27, 1995)

⁵¹ See also 33 U.S.C. §§ 402(p)(3)(A) and (p)(4)(A) (requiring the establishment of industrial stormwater NPDES permits and of a permit application process).

⁵² See, e.g., *Public Interest Research Grp. v. Hercules, Inc.*, 50 F.3d 1239, 1248-49 (3d Cir. 1995) (a notice that adequately identifies specific violations to a potential defendant also covers repeated and related violations that the plaintiff learns of later. "For example, if a permit holder has discharged pollutant 'x' in excess of the permitted effluent limit five times in a month but the citizen has learned only of four violations, the citizen will give notice of the four violations of which the citizen then has knowledge but should be able to include the fifth violation in the suit when it is discovered.")

permitted by law. We will seek an order from the Court requiring Cargill, Inc., to obtain SPDES permit coverage and to correct all other identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

Second, pursuant to Section 309(d) of the CWA,⁵³ each separate violation of the CWA subjects Cargill, Inc. to a penalty not to exceed \$32,500 per day for each violation which occurred between March 15, 2004 and January 12, 2009, up to \$37,500 per day for each violation that occurred after January 12, 2009, and \$52,414 per day for each violation that occurred after November 2, 2015. We will seek the full penalties allowed by law.

Third and lastly, pursuant to Section 505(d) of the CWA, we will seek recovery of their litigation fees and costs (including reasonable attorney and expert witness fees) associated with this matter.

VII.

PERSONS GIVING NOTICE

The full name, address, and telephone number of the persons giving notice are as follows:

Riverkeeper, Inc.
20 Secor Road
Ossining, NY 10562
(914) 422-2133
Attn.: Michael Dulong

VIII.

IDENTIFICATION OF COUNSEL

We are represented by legal counsel in this matter. The name, address, and telephone number of our attorneys are:

Pace Environmental Litigation Clinic, Inc.
Elisabeth Haub School of Law
78 North Broadway
White Plains, NY 10603
Tel (914) 422-4343

⁵³ 33 U.S.C. § 1319(d); *see also* 40 C.F.R. § 19.4 (Adjustment of Civil Monetary Penalties for Inflation).

IX.

CONCLUSION

The foregoing provides more than sufficient information to permit Cargill, Inc., to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.⁵⁴

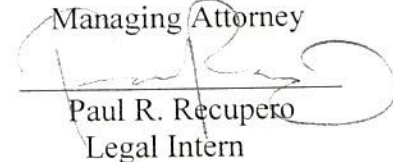
If Cargill, Inc., has developed a SWPPP, we request that Cargill, Inc., send a copy to the undersigned attorney.⁵⁵ Otherwise, we encourage Cargill, Inc., to begin developing a SWPPP immediately after receiving this letter and ask that Cargill, Inc. please inform the undersigned attorney of Cargill, Inc.'s efforts so we can work with Cargill, Inc., to avoid disputes over the contents of the SWPPP.⁵⁶

During the 60-day notice period, we are willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of protracted litigation. If Cargill, Inc., wishes to pursue such discussions, please contact the undersigned attorney immediately so that negotiations may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint in federal court, regardless of whether discussions are continuing at the conclusion of the 60 days.

Sincerely,



Todd D. Ommen
Managing Attorney



Paul R. Recuperero
Legal Intern

⁵⁴ 40 C.F.R. § 135.3(a).

⁵⁵ Note that under Part III.D.2 of the General Permit, the owner or operator of a facility "must make a copy of the SWPPP available to the public within 14 days of receipt of a written request."

⁵⁶ We will not send a new notice letter in response to any effort Cargill, Inc. makes to come into compliance with the Clean Water Act after receiving this letter, for example, by developing a SWPPP. The federal courts have held that citizens sending a notice letter are not required to identify inadequacies in compliance documents that do not yet exist and are "not required to send a second notice letter in order to pursue specific claims regarding the inadequacies of [a defendant's] post-notice compliance efforts." *WaterKeepers N. Cal. v. AG Indus. Mfg.*, 375 F.3d 913, 920 (9th Cir. 2004). See also *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 997 (9th Cir. 2000) ("subject matter jurisdiction is established by providing a notice that is adequate on the date it is given to the defendant. The defendant's later changes . . . do not retroactively divest a district court of jurisdiction under 33 U.S.C. § 1365(b)."); *City of New York v. Anglebrook L.P.*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995) (plaintiff's notice letter based on inadequacies of defendant's original SWPPP held sufficient to establish court's jurisdiction, even though defendant later prepared a revised SWPPP).

Notice of Violation and Intent to Sue
November 1, 2017
Page 13 of 13

cc:

Scott Pruitt, Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Pete Lopez, Acting EPA Region 2 Administrator
Environmental Protection Agency
290 Broadway
New York, NY 10007-1866

Basil Seggos, Commissioner
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-1011

